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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 134.

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, doing business as H. SCHNELL & COMPANY,

Petitioners,

AGAINST

The Steamship VALLESCURA, her engines, boilers, etc.,

LLOYD MEDITERRANEO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioners' recital of facts omits to state certain facts necessarily fatal to the petition, even though the same were otherwise meritorious.

The petition fails to state that the interlocutory decree of the District Court deciding the merits prescribed the rule for the assessment of damages here complained of; that the Commissioner, however, in thereafter assessing the damages, failed and refused to apply that rule; that the District Court, in confirming the Commissioner's report assessing the damages, likewise failed and refused

to apply that rule; that for this failure and refusal of the Commissioner and the District Court to observe the rule so prescribed by the interlocutory decree, among other reasons, the respondent appealed to the Circuit Court of Appeals; *that the petitioners, however, so far from assigning error to the said interlocutory decree on said appeal, accepted the same as prescribing the true rule of damages;* that the Circuit Court of Appeals in reversing the final decree did but enforce against the petitioners the rule of damages so prescribed by the said interlocutory decree and accepted by the petitioners; and that the Circuit Court of Appeals, in refusing to order another reference, and give the petitioners a further chance to attempt to prove their damages according to said rule, did so for two reasons, viz.: First, because of the finding of the Commissioner, *also not excepted to nor otherwise complained of by the petitioners and therefore accepted by the Circuit Court of Appeals as an established fact,* that the damage was of such character that under the rule prescribed by the said interlocutory decree the petitioners could establish no recoverable damage; and, secondly, because *the petitioners in the proceedings before the Commissioner had resolutely refused even to attempt to comply with the rule of damages so prescribed by the said interlocutory decree either by appropriate offers of proof or otherwise.*

The interlocutory decree (Record, p. 324), so far from granting to the petitioners a general recovery of the damages sustained by their cargo of onions, limited their recovery to "such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather"; and expressly denied the petitioners a recovery of any other damage whatever by providing that the petitioners should *not* recover "any damages sustained by it, except such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather."

The Commissioner, although finding that "from the nature of the case", it was "impossible to say how much of the decay was due to lack of ventilation during good weather and how much during bad weather" (Record, p. 420, f. 1260), a burden that the petitioners had stubbornly refused to assume (Record, p. 327, f. 980), nevertheless, in violation of the express provisions of the interlocutory decree, found the Vallescura "liable for all the damage" (Record, p. 425, f. 1275); for which a final decree was entered accordingly (Record, p. 432).

The Circuit Court of Appeals held that the report of the Commissioner and the final decree entered thereon failed to comply with the provisions of the interlocutory decree, accepted as aforesaid by the petitioners, and reversed the said final decree accordingly. Its opinion concluded as follows (Record, p. 445): "The interlocutory decree provided that the libellants recover *only* such damage 'as was caused by closing the hatches and ventilators of the vessel at night during good weather'. The burden of proof resting on the libellants under the law was thus clearly stated in the decree and was not discharged by showing damage which apparently came within the bill of lading exceptions though it might in part have been attributable to the negligence of the ship. Having left the cause of the decay in doubt, the libellants left the ship excused. *The Isla de Panay,* 292 Fed. 723; *The Bencleuch,* 10 F. (2d) 49." (Italics supplied.)

POINT I.

The Petitioners Have no Standing to Complain Here for the First Time of the Rule of Damages Prescribed in the Interlocutory Decree and Accepted by the Circuit Court of Appeals.

Neither the petition nor the brief filed in support of the same attacks the ruling of the Circuit Court of Appeals that the interlocutory decree unambiguously imposed upon the petitioners the burden of proof here complained of. The soundness of that ruling neither is, nor, we believe, could successfully be, questioned.

In the last analysis, therefore, what the petitioners are here seeking to do is to complain of the Circuit Court of Appeals for enforcing against them the rule of damages prescribed by the interlocutory decree. But on the appeal to the Circuit Court of Appeals they assigned no error to the said interlocutory decree nor otherwise complained of the same in any respect. Under such circumstances, they are in no position to complain here that the Court of Appeals did not relieve them from the rule of damages imposed upon them by such interlocutory decree.

Rule 37, subdivision 3, of the Rules of the United States Circuit Court of Appeals for the Second Circuit adopted in December, 1928, requires an appellee in admiralty that desires relief different from that accorded him below to file and serve within ten days after the service of the appellant's notice of appeal an assignment of errors specifying those rulings of the District Court to be made the subject of his attack. It reads: "If the appellee desires other or further relief than that granted by the decree he must within ten days after the appellant has served his Notice of Appeal file with the Clerk of the District Court and serve on the proctor for the appellant an assignment of errors."

This rule was presumably adopted pursuant to the Act of March 3, 1891, Chapter 517, Sec. 2 (26 Stat. 826) as amended by the Act of March 3, 1911, Chapter 231, Section 122 (36 Stat. 1132) and constituting Section 122 of the Judicial Code (28 U. S. C. A., Sec. 219), which provides as follows: "Each Circuit Court of Appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

Whereas prior to the adoption of this rule of procedure the appellee on an appeal in admiralty in the Second Circuit could attack proceedings below without any such assignment of errors (*Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960; *The Townsend*, 29 Fed. (2d) 491), the situation obtaining when the appellant's notice of appeal was allowed herein, viz., July 17, 1933 (Record, p. 434, f. 1302), was quite different (*The Jefferson Myers*, 45 F. (2d) 162; *In re Lee Transit Corp.*, 37 F. (2d) 67; *Federal Ins. Co.* v. *United States*, 60 F. (2d) 46; *The Asfalto*, 51 F. (2d) 982).

POINT II.

Even if the Petitioners were entitled to complain here of the enforcement against them by the Circuit Court of Appeals of the rule of damages prescribed in the interlocutory decree of the District Court, their contention would lack merit.

In paragraph 3 of the bill of lading the parties agreed that there should be no liability on the part of the carrier for decay of the onions (Record, p. 296). The damage affecting the onions at destination was, as found by both

of the courts below, decay. Accordingly the petitioners were entitled to no recovery unless they were able to, and did, show "that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods" [*Clark* v. *Barnwell,* 12 How. 272, 280, 282; *Transportation Co.* v. *Downer,* 11 Wall. 129, 133; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 432; *The Isla de Penay,* 292 Fed. 723, 728-729, (C. C. A. 2nd Cir.), affirmed in 267 U. S. 260); *United States* v. *M. Levy's Sons,* 288 Fed. 544, 545 (C. C. A. 5th Cir.); *Wertheimer* v. *Penn. R. Co.,* 1 Fed. 232, 234 (C. C. S. D. N. Y.); *Wolff* v. *The Vaderland,* 18 Fed. 733, 739 (D. C. S. D. N. Y.)].

The petitioners' contention, as we understand it, is that the court should not have imposed such a burden upon them in this particular case for two reasons, viz: (1) That the bill of lading agreement excepting decay damage was contrary to public policy and absolutely void; and (2) that, even if it was valid, still it was subject to being defeated by their showing merely that the carrier's negligence did or may have contributed to some undefined extent to produce some unknown and unknowable portion thereof.

The first of these two arguments is answered by *Cau* v. *Texas & Pacific Ry. Co., supra,* where, at page 432, the same argument was considered and rejected on the authority of *Clark* v. *Barnwell, supra.*

The second argument is founded upon a failure to distinguish between cases involving exceptions of *kinds* of damage such as decay and breakage on the one hand and cases dealing with exceptions of *causes* of damage such as perils of the seas on the other hand.

In cases of the second of these two classes, where the exception relied upon exempts damage *caused* by a given *peril,* the burden, of course, rests upon the ocean carrier in order to benefit from the exception to show that all or some particular portion of the damage was in fact *caused* by the *peril.*

And, even if, in such cases, the carrier is able to show that all or some definite portion of the damage was caused by the given peril, the libellant may still defeat the exception by showing that the damage-producing peril was itself caused or contributed to by the carrier's negligence. In that event, the benefit of the exception is naturally at once lost. For in such case the carrier's negligence is, since it caused or contributed to the damage-producing peril itself, the cause of *the* damage complained of. Typical cases of that sort in which the libellant succeeded in showing that the damage-producing peril was itself contributed to by the carrier's negligence, with the result that the exception *eo instanti* became a dead letter, are *The Edwin I. Morrison,* 153 U. S. 199, 211, and *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 438, both cited and relied upon by the petitioners.

On the other hand, in cases of the first class, that is, cases relating to exceptions of a given *kind* of damage, once the damage is shown to have been of that particular *kind,* the carrier is under no burden of showing that it resulted from a particular *cause.* Irrespective of cause he stands excused. Of course, *if* the libellant can nevertheless show that such damage or some distinguishable portion thereof was due to a cause to which the carrier's negligence contributed, it can to that extent, but only to that extent, defeat the exception. Typical cases of this class are *The Bencleuch,* 10 F. (2d) 49, 50, 51-52, and *Moes, Moliere & Tromp* v. *Leith & Amsterdam Shipping Co.,* 5 Sess. Cas. (Third Series) 988, 991, 992, 996-998.

In the case at bar, of course, the damage was of a given *kind.* And when that fact appeared the respondent stood excused unless and until the petitioners could show that all or some definite portion of that damage was due to a cause to which the carrier's negligence had contributed. Until the petitioners could do that they were unable to bear their burden of showing to what extent

the respondent could have avoided the loss through the exercise of due skill and diligence in the care of the onions.

Both of the courts below agreed in the finding that the libellants not only had made no attempt to, but could not, establish what portion, if any, of the decay of the onions was due to a cause to which the respondent's negligence had contributed. Hence, it necessarily followed that the petitioners had failed to relieve themselves from the effect of the bill of lading exception.

POINT III.

The petition should be denied.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Respondent
Lloyd Mediterraneo.